(2013) 03 DEL CK 0206

In the Delhi High Court

Case No : Writ Petition (C) 8432 of 2011

Punjab National Bank APPELLANT

Vs

Satinder Kapur and Others RESPONDENT

Date of Decision : 20-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 9
Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 31
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (2013) 5 AD 228 : (2013) 3 BC 160 : (2013) 200 DLT 161 : (2013) 200 DLT 156 : (2013) 135 DRJ 566

Hon'ble Judges : Sanjay Kishan Kaul, J;Indermeet Kaur, J

Bench : Division Bench

Advocate : Dhruv Mehta, Mr. Ashim Vachher, Mr. S.M. Hashmi and Mr. Pawash Piyus, for the Appellant; H.L. Tiku Mr. Munish Gandhi and Mr. Subhanker Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—The present writ petition has been filed under Article 226 of the Constitution of India. The prayer in the petition seeks a quashing of the order dated 02.9.2011 and a subsequent order dated 22.9.2011 passed by the Debt Recovery Appellate Tribunal (DRAT). The aforenoted two orders were passed on the review applications preferred by the appellants before the DRAT seeking quashing of the original orders dated 04.11.2010 and 22.11.2010. These review applications had been dismissed. The petitioner bank is aggrieved by the aforenoted orders. Respondent No. 1 (Satinder Kapur/buyer) was a director of M/s. Indian Magnetic (hereinafter referred to as the respondent No. 2), a company incorporated under the Indian Companies Act.

2. On 13.6.1992 respondent No. 1 entered into a buy back agreement with M/s. PNB Capital Services Limited (hereinafter referred to as the subscriber) a company registered under the Indian Companies Act, 1956. The said company

subscribed to the equity shares of respondent No. 2 in terms of the said buy back agreement. In case of failure or default on the part of the buyer to buy back the equity shares as stipulated in the agreement, the subscriber was entitled to file a suit for specific performance or in the alternate to sell the entire holding of 10,00,000 shares as were held by the subscriber in the open market.

3. In the year 1996, on the request of respondent No. 2, the petitioner bank had granted loan to it. There were three loan accounts of respondent No. 2. Respondent No. 1 had stood guarantee to the said loan. Respondent No. 2 defaulted in its repayment schedule.

4. The petitioner Bank was accordingly constrained to file OA No. 110/1996 against the respondent No. 2.

5. In the same year i.e. in 1996 the subscriber filed a suit for specific performance (Suit No. 674/1996) before the High Court against Satinder Kapur for not adhering to the buy-back agreement. Subsequently the subscriber merged with the petitioner bank; accordingly an application was filed before the High Court seeking an amendment in the plaint which was allowed on 07.3.2005. On 23.8.2005 this suit was transferred to the Debt Recovery Tribunal (DRT) in terms of Section 31 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (RDDBFI) which was registered as T.A. No. 3/2005.

6. This transfer petition was opposed by Satinder Kapur. Reply of the petitioner bank in those proceedings is relevant. The stand of the petitioner bank was that no piecemeal adjudication can take place in the O.A. and T.A. separately; the High Court was right in transferring the case to the DRT. Both the matters had to be tried by the DRT. This stand of the bank is reflected in the order of the DRT dated 06.10.2009 passed in I.A. No. 299/2008 in T.A. No. 3/2005.

7. Thus there were two proceedings pending before the DRT i.e. O.A. No. 110/1996 and T.A. No. 3/2005.

8. Learned counsel for the parties have taken us through the various correspondences exchanged between Satinder Kapur and the petitioner bank. The first of these correspondences starts from 24.9.2007. This was a proposal by Satinder Kapur for a One Time Settlement (OTS) with the Bank. Relevant extract of the letter dated 24.9.2007 addressed by Satinder Kapur to the General Manager Punjab National Bank reads herein as under:

The General Manager

Punjab National Bank

NPA Recovery Cell

Rohit House

Tolstoy Marg

New Delhi

For the kind attention of Shri Vinay Kumar

Sub:- Indian Magnetics Ltd. (in liquidation proposal of One Time Settlement of Liability)

Dear Sir,

This has reference to our personal discussions and to the subject outstanding amounts on account of M/s. Indian Magnectis Ltd. (In Liquidation) ["The Company"]. This also has reference to the ongoing matters filed by the Bank before the Hon''ble Debt Recovery Tribunal, Delhi.

It is requested that as part of the OTS sanction terms, and upon complete payment of the OTS amount by the undersigned, the bank shall settle, compound and withdraw all pending matters that may have been filed by it against the company, its Directors and Guarantors, and pending before various courts and tribunals of competent jurisdiction, including but not limited to OA No. 110/96 pending before the Hon''ble DRT, New Delhi and also the Criminal Case pending before the Patiala House Courts at New Delhi."

9. On 06.01.2008 Satinder Kapur wrote to the petitioner bank increasing his initial OTS offer of Rs. 75 lacs to Rs. 125 lacs; he also sought confirmation of the acceptance of the OTS proposal.

10. On 29.01.2008 the Bank wrote back to Satinder Kapur informing him that the OTS of Rs. 125 lacs has been accepted; the up front amount of Rs. 5 lacs having been deposited, the balance of Rs. 120 lacs should be paid within three months. This letter in para 7 notes as under:

Compromise is being considered by bank as commercial decision & shall have no bearing whatsoever on the ongoing criminal case/investigation if any being carried out by police and the same shall proceed as per law.

11. On 31.01.2008 Satinder Kapur wrote to the Bank seeking an amendment qua the communication dated 29.01.2008. The amendments sought were to the following effect:

1. That upon payment of the Compromise amount, the private criminal complaint filed by the bank against the company and its directors, currently pending before Patiala House courts shall stand compounded/withdrawn. You may note that this is a private complaint and can well be compounded under law upon settlement between the parties. For your information, to our knowledge, there is no ongoing Police Case/investigation against the company and/or its directors.

4. It also needs to be confirmed that upon full satisfaction of the Compromise and remised from all liability and obligation towards the bank on account of the outstanding liability of India Magnetics Ltd.

5. Lastly it needs to be mentioned that upon satisfaction of the Compromise Amount, the bank shall withdraw the names of the company and its directors and

guarantors as it may have forwarded to the RBI to include in any defaulters list that may be maintained by the RBI.

12. These amendments were accepted by the Bank and vide their letter dated 16.5.2008 it was accepted by the Bank that upon payment of the full compromise amount the Bank would inform the concerned court that it was not interested in pursuing the criminal complaint. All other conditions of sanction as conveyed by their letter dated 31.01.2008 would remain unchanged.

13. On 08.4.2009 a no dues certificate was issued by the Bank to Satinder Kapur. This document was addressed to Satinder Kapur and which reads herein as under:

PUBJAB NATIONAL BANK

ASSET RECOVERY MANAGEMENT BRANCH

10th Floor Atma Ram House, 1-Tolstoy Marg, New Delhi

(Phones 233263/4, 23319314 Fax 23357996)

Ref: ARMB: GNS: KSB

08.04.2009

To whom it may concern

Certified that Sh. Satinder Kapur has entered into an OTS for Rs. 125.00 lacs in the account of M/s. Indian Magnetics Ltd. and has deposited the entire OTS amount. The Bank has no dues against the party.

Chief Manager

Shri Satinder Kapur

C-39, Anand Niketan

New Delhi-110021

14. It is relevant to point out that not only the no dues certificate but in fact all correspondences exchanged were between the petitioner Bank and Satinder Kapur.

15. On 28.10.2010 the DRAT passed the following order "28.10.2010 Mr. Justice J.M. Malik

Present: Mr. Manish Gandhi, Counsel for the appellant

Mr. Ashim Vachher, Advocate for Respondent No. 1

Mr. U.N. Singh, Advocate for OL.

Costs not deposited. One more opportunity granted to deposit the same before the next date of hearing. Complete paper be given to the counsel for the respondent.

Counsel for the respondent submits that to his mind the matter stands settled and he wants to seek instructions from PNB or in the alternative the case is fixed for final arguments on 4.11.2010."

16. The presence of the counsel for respondent No. 1/petitioner bank had been noted. It was noted that it was the counsel for the respondent who had made a submission that the matter stood settled and he would be taking instructions from the Bank. This order was passed in T.A. No. 3/2005.

17. On 04.11.2010 the DRAT passed the following order:

04.11.2010 Mr. Justice J.M. Malik

Present: Mr. Praveen Agarwal with Mr. Manish Gandhi, Counsel for the appellant

Mr. Abhilash representing Mr. Ashim Vachher, counsel for the 1st respondent

Mr. U.N. Singh, counsel for the Official Liquidator

The counsel for the appellant has presented a photocopy of the certificate dated 8.4.2009 issued by Punjab National Bank to the appellant, which says that the appellant has entered into an OTS for Rs. 125 lacs in the account of M/s. Indian Magnetics Ltd. and has deposited the entire OTS amount.

Since the matter has been settled, the appeal is disposed of as such. In view of this compromise, the T.A. No. 3/2005 (Delhi-II) also stands disposed of. However, if there is any problem, the parties are at liberty to approach this Tribunal again.

Copies of this order be furnished to the parties as per law and another copy be sent to the learned DRT.

18. The petitioner bank was represented through counsel; the DRAT had noted that in view of the compromise and the OTS having been entered into between the parties for Rs. 125 lacs the T.A. No. 3/2005 stood disposed of.

19. On 22.11.2010 the DRT recorded the following order:

Dated:-22.11.2010

Present:- None.

Heard and perused the record.

The Hon''ble DRAT has permitted the bank to withdraw the case on the basis of the compromise having been arrived at between the parties.

TA thus stands disposed off as withdrawn.

Let record be consigned.

20. It was noted that since the DRAT had permitted the petitioner bank to

withdraw its case on the basis of the compromise having been arrived at between the parties the T.A. stood disposed of as withdrawn. On this date neither of the parties were present. The DRT had, by this order, only endorsed the finding already returned by the DRAT which had on 04.11.2010 had already disposed of T.A. No. 3/2005.

21. As pointed out supra neither of these aforenoted orders i.e. order dated 04.11.2010 and 22.11.2010 have been challenged. Both these orders dated 04.11.2010 (DRAT) and 22.11.2010 (DRT) have since attained a finality. There is no dispute to this.

22. On a specific query put to the learned senior counsel for the petitioner on this score he fairly concedes that this writ petition has not challenged the aforenoted orders but has only restricted its challenge to the orders dated 02.9.2011 and 22.9.2011 which were passed by the DRAT seeking a review of the orders dated 04.11.2010 and 22.11.2010. These orders dated 04.11.2010 and 22.11.2010 having thus attained a finality, thus Court can go behind those orders. The challenge in the writ petition is confined only to the orders dated 02.9.2011 and 22.9.2011.

23. On 02.09.2011, the following order was passed:-

02.09.2011 Mr. Justice R.K. Gupta

Present: Mr. Aman Shankar, counsel for the applicant

Mr. Manish Gandhi, counsel for the non-applicant

Mr. Aman Shankar appears for the applicant and on behalf of the non-applicant Mr. Manish Gandhi appears.

The original appeal preferred by the non-applicant has already been disposed of on 04.11.2010 and counsel for the appellant/non-applicant has presented the photocopy of the certificate dated 08.04.2009 issued by Punjab National Bank to the appellant wherein it is stated that the appellant has entered into an OTS for Rs. 125 lacs in the account of M/s. Indian Magnetics Ltd. and has deposited the entire OTS amount.

Since the matter was reported to be settled between the parties, therefore, the appeal was disposed of by this Tribunal in view of the compromise arrived at. Subsequently, the bank moved an application that there has been two accounts and the settlement which was reported by this Tribunal on 04.11.2010 was the settlement in relation to one account. No documents have been filed by the bank to substantiate its case that the OTS was in relation to only one account.

In view of the aforesaid, no further clarification is required as the appeal has already been disposed of by this Tribunal by order dated 04.11.2010.

The application for clarification stands rejected.

Copies of this order be furnished to the parties as per law and one copy be sent to the Ld. DRT forthwith.

24. Order dated 02.9.2011 had noted that no clarification of the order dated 04.11.2011 as was sought for by the petitioner bank was necessitated as the matter was settled between the parties and the appellate tribunal had disposed of the T.A. noting the compromise arrived at between the parties. No documents had also been filed by the petitioner bank to substantiate its case that the OTS was in relation only to the account of M/s. Indian Magnetics Limited and did not encompass the T.A.

25. On 22.09.2011, the order passed was as under:-

22.9.2011 Mr. Justice R.K. Gupta

Present: Mr. Ashim Vachher, counsel for the respondent/applicant bank.

Mr. Ashim Vachher appears for the respondent/applicant bank. He is heard on the application seeking review of the order dated 02.09.2011.

The main appeal is already disposed of by this Tribunal by order dated 04.11.2010. Thereafter the bank moved an application for review and in the review application so filed by the bank this Tribunal has already passed an order on 02.09.2011. The respondent bank moves another application to review the order dated 02.09.2011 which was passed in the review application.

On the basis of the aforesaid by applying the analogy of Order XLVII Rule 9 CPC no second review is applicable and the review application is dismissed.

Copies of this order be furnished to the parties as per law and one copy be sent to the Ld. DRT forthwith.

26. The order dated 02.9.2011 had dismissed the review petition sought for by the bank on the ground that a second review is not maintainable.

27. It is in this background that the arguments of the petitioner have to be appreciated.

28. Learned senior counsel for the petitioner submits that the bank had entered into an OTS only with respondent No. 1; Satinder Kapur was acting as director of respondent No. 2; there was no occasion for the bank to have suffered such a heavy monetary loss and would have agreed to compromise the matter for Rs. 125 lacs which would include not only the three defaulting loan accounts of the company but also other dues under the buy-back agreement; this was never the intention of the Bank and is clearly reflected from the fact that immediately after the order dated 04.11.2010 and 22.11.2010 the application seeking recall of the aforenoted orders were filed by the bank. Miscellaneous Application No. 413/2011 sought a recall and review of the order dated 04.11.2010; it was accompanied by a Miscellaneous Application No. 421/2011 seeking condonation of delay of 152 days. These applications are undated but appear to have been filed in May, 2011 seeking a recall of the order dated 04.11.2010 and 22.11.2010

had also been filed. Thus this submission of the learned senior counsel for the petitioner that the petitioner sought a recall of the orders dated 04.11.2010 and 22.11.2010 forthwith is negatived by the record itself.

29. Arguments have been refuted. Learned counsel for the respondent points out that it was clearly understood between the parties that this OTS would be a wholesome arrangement between the petitioner bank and Satinder Kapur which would encompass not only the amounts due from respondent No. 2 but also the amounts due on the buy-back agreement.

30. We are not in agreement with the submission of the learned counsel for the petitioner. The record does not support his plea. The correspondences exchanged between the parties start from 24.9.2007 when for the first time the proposal for an OTS was initiated. It was through Satinder Kapur; all correspondences thereafter to and fro the bank were with Satinder Kapur. Satinder Kapur was admittedly a director of respondent No. 2. In the communication dated 24.9.2007, in para 1, there is a reference of the OTS to encompass all "ongoing matters" filed by the petitioner bank which were pending before the DRT. At that stage there were two petitions pending before the DRT; it was O.A. No. 110/1996 and T.A. No. 3/2005. The language in this para being in the plural obviously had a reference to the aforenoted two matters and not to the singular O.A. as has been urged by the learned counsel for the petitioner. Para 7 of this communication is also relevant; it clearly states that pursuant to the acceptance of the OTS by the Bank, the Bank will settle, compound and withdraw all pending matters that may have been filed by it against company, its directors and guarantors and pending before various courts and tribunals of competent jurisdiction including but not limited to O.A. No. 110/1996 pending before the DRT, New Delhi and also the Criminal Case pending before the Patiala House Courts, New Delhi. The language of this paragraph makes it abundantly clear that the parties had all along intended that on the acceptance of the OTS by the bank not only would the O.A. No. 110/1996, the Criminal Case pending before the Patiala House Courts but all other pending matters would be withdrawn against the company, its directors and guarantors. It was not restricted to the O.A. and the Criminal Case alone it; was to encompass all such pending litigations inter se the parties which were not only against respondent No. 2 but also against its directors and guarantors. Intent of the parties to settle all matters including the T.A. was abundantly clear from this communication.

31. Satinder Kapur had given a personal guarantee for the loans advanced to respondent No. 2. The company was, however, not in good shape and on a reference made by Board for Industrial & Financial Reconstruction (BIFR) u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 the company was wound up in C.P. No. 433/1998 on 01.12.2000. Admittedly, the company was in liquidation and the Official Liquidator had taken charge of its assets. Satinder Kapur in his second capacity as the signatory of the buy-back agreement was also facing litigation from the petitioner bank pursuant to the suit for specific

performance which had been filed in the High Court but thereafter in pursuant to the order dated 23.8.2005 was transferred to the DRT and numbered as T.A. NO. 3/2005. The penalty for not adhering to the conditions in the buy-back agreement have been noted supra; the subscriber would have the right to file a suit for specific performance or in the alternate to sell 10,00,000 shares held by him of respondent No. 2 in the open market. Admittedly a part of this shareholding had been sold by the petitioner bank.

32. It was in this scenario when both the O.A. and the T.A. were pending before the DRT that Satinder Kapur initiated this proposal for an OTS. Satinder Kapur as a director of respondent No. 2 cannot be diversified from Satinder Kapur, the signatory of the buy-back agreement. There is no doubt to the legal proposition that a company is a distinct legal entity but the company/respondent No. 2 was all along acting through Satinder Kapur. Efforts for settlement in the account of respondent No. 2 were being made by Satinder Kapur. In this scenario it would be impossible to imagine that Satinder Kapur wanted to discharge the liability of the company (which was in liquidation) and of whom he was only one director amongst others and the company having a limited liability with no personal liability (which could be enforced upon Satinder Kapur only if charges of misfeasance were proved against him); it is but obvious that Satinder Kapur and the Bank had intended that the OTS would encompass the liability of Satinder Kapur qua the buy-back agreement as well. The entity of Satinder Kapur as director of respondent No. 2 was superimposed upon the entity of Satinder Kapur as the signatory of the buy-back agreement. In this OTS they were one and the same. This is clarified by the subsequent letter written by the petitioner bank on 29.01.2008 approving the OTS and for settling all pending matters including discharge of the guarantors from their liabilities. The No Dues Certificate issued by the Bank on 08.4.2009 was also in favour of Satinder Kapur certifying "certified that Satinder Kapur had entered into an OTS for Rs. 125.00 lacs in the account of M/s. Indian Magnetics Limited and has deposited entire OTS amount, the bank has no dues against the party". On 28.10.2010 counsel for the Bank had also appeared before the DRAT wherein a statement was made that the matter stood settled and it was accordingly adjourned to 04.11.2010. On 04.11.2010 in the presence of the counsel for the petitioner bank a settlement proposal between the parties was noted and T.A. No. 3/2005 was disposed. There was no objection raised by the counsel for the petitioner that such an order could not have been passed. Pursuant to this order the DRT on 22.11.2010 disposed of T.A. No. 3/2005; the application seeking review of the orders dated 04.11.2010 and 22.11.2010 was filed several months later i.e. in May, 2011. No satisfactory explanation was furnished in the said application and this is evident from the perusal of the same. These applications were dismissed on 02.9.2012 by the DRAT. It was noted that the OTS was with regard to both the accounts i.e. O.A. No. 110/1996 and T.A. No. 3/2005. The review application seeking recall of this order dated 02.9.2011 was dismissed on 22.9.2011; this was in terms of the provisions of Order XLVII Rule 9 of the Code; admittedly a second review was

not maintainable. It is only the last two aforenoted orders i.e. the order dated 02.9.2011 and order dated 22.9.2011 which are the subject matter of challenge before this Court. This challenge is limited and confined only to the parameters and guidelines to be followed by the court while dealing with a review application. There is no fault in either of these orders. Unless and until there is an error apparent on the face of the record or there is a discovery of a new fact which after exercise of due diligence was within the knowledge of the petitioner at the time when the impugned order was passed; no ground for review is made out. Within these parameters the impugned orders suffer from no infirmity. That apart this Court has gone on to examine all the averments made by the petitioner on merits and the earlier order dated 04.11.2010 passed by the DRT as also the order of the DRAT dated 22.11.2010 also with-stand the test of fairness. On no count does the petitioner deserve any relief. Petition is without any merit; it is dismissed.

